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No. 96-79

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

SANDRA JEAN DALE BOGGS,
Petitioner,
v.
THOMAS F. BOGGS, HARRY M. BOGGS,
AND DAVID B. BOGGS,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF THE EMPLOYERS COUNCIL ON FLEXIBLE COMPENSATION AS *AMICUS CURIAE* SUPPORTING PETITIONER

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BRIEF OF THE EMPLOYERS COUNCIL ON FLEXIBLE COMPENSATION AS *AMICUS CURIAE* SUPPORTING PETITIONER

The Employers Council on Flexible Compensation ("ECFC") submits this brief *amicus curiae* supporting Petitioner.

The parties have consented to the filing of this brief. Correspondence reflecting the parties' consent has been lodged with the Clerk.

INTEREST OF THE AMICUS CURIAE

ECFC is a non-profit membership association committed to the study and promotion of 401(k) plans,[1] cafeteria

[1] Plans authorized by section 401(k) of the Internal Revenue Code. Such plans are tax-qualified and are pension plans of the defined contribution type under ERISA.

plans and other employee benefit plans. The more than 2,800 members of ECFC are plan sponsors, corporations, governments, unions, universities, hospitals and clinics and actuarial, insurance and accounting firms that design, sponsor and administer plans.

Should the Court uphold the decision of the court below in this case, pension plans will be subject to a burdensome and conflicting patchwork of state and federal law. ECFC's members have a profound and immediate interest in the outcome of this case and its effect on their ability to sponsor and administer pension plans.

SUMMARY OF ARGUMENT

The Court should reverse the court of appeal's decision below.

This case is different from the other preemption cases decided by the Court under ERISA.[2] This case involves the narrow question of marital property preemption which Congress has already addressed in a "comprehensive and reticulated statute,"[3] namely ERISA's provisions creating and protecting the property interests of spouses in the event of divorce or death of a pension plan participant.[4]

This case does not involve metaphysical speculations about what it means for a state law to "relate to" a pension plan. Nor have we here an effect which is tenuous, remote or peripheral. As we will demonstrate below, the *Boggs* decision interferes with core ERISA rights.[5] *Boggs* further subjects plan administration to the very burdens and conflicts ERISA was enacted to eliminate.[6] To demonstrate this, we will describe the practical effects of this case on plan administrators.[7]

[2] Employee Retirement Income Security Act of 1974, P.L. 93-406, 29 U.S.C. § 1001 *et seq.*

[3] See *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 361; *reh'g denied*, 448 U.S. 908 (1980).

[4] See Part II below.

[5] See Part III below.

[6] See Part IV below.

ERISA's provisions for the protection of spousal interests in a pension plan represent a carefully designed balance between family property interests and the uniform federal scheme created by ERISA. The Court should hold that marital property rights to ERISA pensions under state law are preempted, unless the rights are enforced within the special framework created for those rights by ERISA. As the state rights at issue in this case are not asserted within that ERISA framework, we respectfully urge that the Court reverse the decision of the court of appeals.

ARGUMENT

I. *BOGGS* IS NOT DISTINGUISHABLE FROM *ABLAMIS*.

Presumably one of the motivations for reviewing this case is the conflict between the Fifth Circuit's reasoning below and the Ninth Circuit's reasoning in *Ablamis v. Roper*.[8] The *Boggs* decision held that state marital property laws as applied to ERISA-covered pensions was not preempted, while *Ablamis* held that it was.

The two cases are at first glance distinguishable in that *Boggs* deals with benefits which have already been paid out of a pension plan, while *Ablamis* deals with benefits not yet paid. We nonetheless urge the Court not to distinguish the cases on that basis. We respectfully urge the Court to apply the reasoning of *Ablamis* to the facts in *Boggs*, and hold that ERISA preempts state marital property claims whether addressed to the plan or to the plan beneficiary after payout.

A. State Courts Are Not Likely to Limit *Boggs* to Its Facts.

While the Fifth Circuit based its decision in part on the idea that the plan in the *Boggs* case would be unaffected,

[7] See Part IV below.

[8] 937 F.2d 1450 (9th Cir. 1991).

we believe other courts would soon conclude that this aspect of the decision was not a crucial one. They would find that, to make their orders effective, they would have to direct them to the plans themselves, reaching the money before it is paid out.

The reason for this is obvious from *Stone v. Stone*.[9] In that case, the plan participant was divorced and his wife obtained a court order directing that a portion of his pension be paid to her. The participant retired and left the country, leaving no assets in the United States and refusing to turn over to his former spouse the benefits she was entitled to by court order. If the court had not applied its order to the plan itself, the wife would have been unable to enforce her marital property rights.

Partly in response to *Stone v. Stone*, Congress amended ERISA to give state courts the opportunity to divide ERISA pensions, but within a unifying framework set forth in ERISA.[10] We believe that if state courts are given the authority to divide ERISA pensions outside of this framework, they are bound to conclude that they have the power to make their orders effective. As *Stone v. Stone* shows, this will inevitably lead to levying on plans directly. In fact, it was precisely this reasoning that led the court in *Baker v. Baker*[11] to require a plan to pay a pension *twice*—with interest.

The *Baker* opinion contains other hints as to why state courts would have to extend *Boggs* to orders against the plans themselves: participants might be judgment proof for any number of reasons; the participant might take a complete distribution and abscond with the money; or a participant might make investment elections or distribution form elections that would effectively diminish the

[9] 632 F.2d 740 (9th Cir. 1980), *cert. denied*, 453 U.S. 922 (1981).

[10] Legislative history of the Retirement Equity Act (REA) is quoted fully on this point at page 9.

[11] 251 Cal. Rptr. 126 (1st Dist. 1988).

value of benefits reachable by his or her spouse. The courts will not feel they are helpless to prevent such obvious machinations.

Thus, to uphold *Boggs*, even with a narrow holding applicable only to payments outside of the plan, would in the long run fail to relieve plans of the costs and burdens of coping with a marital property scheme unchecked by ERISA restraints. And it would not solve the other, more important part of the problem, which is assuring our employees that the pensions needed to live on during retirement will be there as promised for both themselves and their spouses.

B. The Theory Underlying the *Boggs* Holding Does Not Support a Distinction.

Because of the distinction in the facts of the two cases (benefits paid versus benefits payable), the differing outcomes between *Boggs* and *Ablamis* may appear to have a superficial resemblance to the outcomes of certain cases involving ERISA preemption of state garnishment laws. These cases have held that, while ERISA preempts state garnishment actions applied to assets within a pension plan, preemption no longer protects the assets once they have been distributed to the participant.[12]

This resemblance is superficial only, and should not serve as the basis for distinguishing *Boggs* from *Ablamis*. In the garnishment cases, creditors' claims applied generally to all of a debtor's assets. That some of those assets had happened at one time to be in an ERISA plan did not save them from creditors' more general claims. In *Boggs*, by contrast, respondents have no general rights to Petitioner's assets. Their claim to the portion of her assets at issue in this case has no purported foundation apart

[12] See, e.g., *Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 493 U.S. 365 (1990), *appeal after remand*, *remanded* 10 F.3d 700 (10th Cir. 1993), *modified on reh'g and remanded on other grounds*, 39 F.3d 1078 (10th Cir. 1994), *cert. denied*, 115 S.Ct. 1691 (1995).

from the fact that those assets at one time were in an ERISA plan.

For these reasons, we believe that a distinction between *Boggs* and *Ablamis* is supported neither by its practical consequences nor by any parallels with the garnishment cases.

II. CONGRESS HAS ALREADY DECIDED THIS CASE.

We recognize that the Court may be reluctant to permit federal interference with a time-honored subject of state law, but this is clearly what Congress intended to do.

A. Congress Amended ERISA to Provide a Comprehensive Scheme of Spousal Rights in Participants' Pensions.

Congress struck a balance between the competing considerations involved in this case in 1984 by enacting the Retirement Equity Act ("REA").[13] Amendments to ERISA ensure spousal rights in an employee's pension —property rights that would survive divorce or the death of the employee. Congress at the same time modified the income tax rules applicable to pension plans and individuals, to be consistent with the creation of these spousal rights. By amending ERISA to clarify spousal interests in a pension, Congress achieved a balance between the expectations of participant's spouses to an adequate retirement income in old age, and the interests of pension plans in national uniformity and the avoidance of conflicting regulatory schemes and excessive administrative costs.[14]

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[13] P.L. 98-397, 98 Stat. 1436 *et seq.*

[14] One of the fundamental purposes of ERISA repeatedly emphasized by this Court's decisions is the goal of achieving national uniformity for employee benefit plans and avoiding conflicting state directives. *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 115 S.Ct. 1671 (1995), *Ingersoll-Rand v. McClendon*, 498 U.S. 133 (1990), *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987), *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85 (1983).

REA's provisions for protection of domestic property rights in a pension involved two parts: mandatory survivor benefits for a spouse following the death of the pension participant, and provisions for the protection of spouses (and minor children) in the event of a divorce.

B. ERISA Mandates Survivor Benefits for a Spouse After a Participant's Death.

To protect surviving spouses who might have been dependent on the earnings or pension of a spouse employed outside the home, REA provided mandatory survivor benefits.[15] In simple terms, these provisions require payment of a pension after the death of a married pension plan participant to the surviving spouse for the spouse's lifetime. Generally, payments under the survivor pension must equal at least 50% of those made during the participant's lifetime. Such provisions had been optional under prior law.[16] By making them mandatory, Congress gave spouses in separate property jurisdictions enforceable rights to their spouses' pensions.

We want to stress the magnitude of the property transfer Congress wrought by vesting in spouses an absolute right to a benefit after the death of a pension plan participant. In separate property jurisdictions, REA divested participants of previous rights they may have enjoyed under the plan to control the survivor benefits under their own pension—for example, to designate their children as sole beneficiaries, or to take their entire pension as a life interest, with no survivor benefits. After REA, the participant may exercise these rights only with the consent of his or her spouse. Legislative history shows that Congress thought this transfer of property interests was

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[15] I.R.C. §§ 401(a)(11), 417 and ERISA § 205, 29 U.S.C. § 1055.

[16] I.R.C. § 401(a)(11) (1983), ERISA § 205 (1983), 29 U.S.C. § 1055 (1983).

appropriate to protect a surviving spouse's expectations in pension income after the death of the participant.[17]

After REA, a spouse's rights to survivor benefits under an ERISA pension plan are governed exclusively by federal law—whether or not the right arises in a community property jurisdiction. Spouses in separate property jurisdictions now have rights similar to those previously enjoyed only by spouses in community property jurisdictions. At the same time, REA replaced the rights of spouses in community property jurisdictions with rights under uniform federal law. For example, typical community property statutes give a spouse a claim only on those assets accumulated during marriage. By contrast, the spouse's claim to a survivor benefit under ERISA is based on the deceased participant's entire pension—including the pension accrued before marriage.[18] The spouse's REA survivor rights trump any other rights or provisions of a pre-nuptial agreement.[19]

C. For Spouses Who Claim Rights Other Than Survivor Benefits, ERISA Creates a Uniform Means of Enforcing Those Rights.

REA also provided for protection of rights under state domestic relations laws within a uniform federal scheme. In several related provisions, Congress created "qualified

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[17] S. Rep. No. 575, 98th Cong., 2d Sess. 12 (Aug. 5, 1984). "The Committee believes that present law results in inequitable treatment of participants in pension plans who die before reaching the normal retirement age under the employer's plan . . . in addition, because the Committee believes that a spouse should be involved in making choices with respect to retirement income on which the spouse may also rely, the bill requires spousal consent when a participant elects not to take a survivor benefit."

[18] I.R.C. §§ 417(b); 417(c). ERISA § 205(d); ERISA § 205(e)(1), 29 U.S.C. §§ 1055(d); 1055(e)(1).

[19] Treas. Reg. § 1.401(a)-20, Q&A-28 (prenuptial agreement cannot waive spouse's REA survivor rights); *see, e.g., Hurwitz v. Sher*, 982 F.2d 778 (2d Cir. 1992), *cert. denied*, 508 U.S. 912 (1993).

domestic relation orders" (QDROs).[20] The QDRO provisions provide a set of rules and procedures for enforcing marital property claims against ERISA-covered pension plans. At the same time, Congress amended ERISA's spendthrift and preemption rules. The spendthrift and preemption amendments make clear that QDROs are the exclusive method of enforcing marital property claims against ERISA-covered pension plans. Other methods are preempted.

The amended spendthrift rule is clear that Congress intended to curb both community property and separate property rights against an ERISA plan. Generally, the spendthrift rule prohibits alienation or assignment of an ERISA plan benefit. REA created an exception to the spendthrift rule for certain "domestic relations orders."[21] A "domestic relations order" specifically includes orders "made pursuant to a State domestic relations law (including a community property law)."[22]

REA's legislative history[23] also makes clear that Congress was contemplating community property along with separate property:

> Several cases have arisen in which courts have been required to determine whether the ERISA preemption and spendthrift provisions apply to family support obligations (*e.g.*, alimony, separate maintenance, and child support obligations). In some of these cases, the courts have held that ERISA was not intended to preempt State domestic relations law permitting the attachment of vested benefits for the purpose of meet-

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[20] I.R.C. §§ 401(a)(13) (spendthrift), 414(p) (QDROs), ERISA §§ 206(d) (spendthrift and QDROs), 514(b)(7) (preemption), 29 U.S.C. §§ 1056(d), 1144(b)(7).

[21] I.R.C. § 401(a)(13)(B), ERISA § 206(d)(3)(A), 29 U.S.C. § 1056(d)(3)(A) (similar).

[22] I.R.C. § 414(p)(1)(B)(ii), ERISA § 206(d)(3)(B)(ii)(II), 29 U.S.C. § 1056(d)(3)(B)(ii)(II).

[23] S. Rep. No. 98-575, 98th Cong., 2d Sess. 18-19 (Aug. 5, 1984).

ing these obligations.[22] Some courts have held that the ERISA preemption provision does not prevent application of State law permitting attachment of nonvested benefits for the purpose of meeting family support obligations.[23] There is a divergence of opinion among the courts as to whether ERISA preempts State community property laws insofar as they relate to the rights of a married couple to benefits under a pension plan, etc.[24]

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[22] *See, e.g., American Telephone and Telegraph Co. v. Merry*, 592 F.2d 118 (2d Cir. 1979); *Cody v. Riecker*, 594 F.2d 314 (2d Cir. 1979).

[23] *See, e.g., Weir v. Weir*, 41[3] A.2d 638 (1980); *Kikkert v. Kikkert*, 427 A.2d 76 (1981).

[24] In *Stone v. Stone*, 63[2] F.2d 740 (9th Cir. 1980), the Court held that ERISA was not intended to preempt community property laws and that a court order requiring a division of retirement benefits did not violate the anti-assignment provisions. In *Francis v. United Technolog[ies] Corp.*, 458 F. Supp. 84 (N.D. Cal. 1978), however, the Court held that ERISA's preemption provision prevents the application of State community property law permitting attachment of plan benefits for family support purposes.

While clarifying that ERISA's spendthrift rule preempts state domestic relations laws generally (including community property laws), Congress carved out an exception for state laws enforced through QDROs. As defined by REA, QDROs are court orders that enforce state domestic relations laws, and that meet certain substantive and procedural requirements. These requirements ensure that the rights of all potential claimants to ERISA pension assets are protected:

- A QDRO cannot require a plan to provide any type or form of benefit, or any option, not otherwise provided under the plan.
- A QDRO cannot require a plan to provide increased benefits (determined on the basis of actuarial value).

- A QDRO cannot require the payment of benefits to one alternate payee which are required to be paid to another alternate payee under another QDRO.
- A QDRO cannot require a plan to pay benefits to an alternate payee before the earliest retirement age under the plan.

In *Boggs*, the Fifth Circuit recognizes marital property orders outside of a QDRO. This in essence accords the order QDRO treatment without any of the QDRO restrictions, which is to say, without protection for any of the other interests Congress tried to safeguard.

In REA, Congress also modified several other provisions of ERISA (and the Internal Revenue Code) to further define the rights of QDRO claimants. These provisions were not modified for takers under non-QDRO orders—because Congress contemplated that no such takers could exist.

For example, ERISA creates rights only for "participants" (the worker who earns the pension), and "beneficiaries."[24] In REA, Congress specifically made QDRO claimants "beneficiaries" under ERISA, entitling them to ERISA's fiduciary protections.[25] Congress enacted no such provision for non-QDRO claimants.

REA also changed federal tax laws affecting pension plans. Among other things, these rules place limits on how early money can come out of a plan. REA created special

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[24] ERISA §§ 3(7) (defining participant); 3(8) (defining beneficiary), 403(c) (assets of a plan are held for the exclusive benefit of participants and beneficiaries); 404(a) (fiduciary discharges his duty for the exclusive benefit of participants and beneficiaries), 29 U.S.C. §§ 1002(7), 1002(8), 1103(c), 1104(a).

[25] ERISA §§ 3(8), 206(d)(3)(J), 404(a)(1)(A), 29 U.S.C. §§ 1002(8), 1056(d)(3)(J), 1104(a)(1)(A).

waivers for these rules in the case of QDROs—but not for any other kind of marital property order.[26]

REA also modified the personal income tax. REA provided that in community property states, the participant spouse is taxed on the entire pension distribution. REA simultaneously provided an exception for certain distributions to the non-participant spouse (thus ensuring that the tax falls on the individual who receives the distribution)—but only those enforced under QDROs.[27] No such "rationalizing" exception was provided for non-QDRO claimants.

In the next section, we set forth in more detail the vastly complex practical consequences of recognizing state law claimants who are not QDRO claimants (and thus, as we have stated, not ERISA "participants" or "beneficiaries," nor subject to the federal tax changes enacted by REA). In this section, we have aimed to demonstrate two more limited points. First, Congress knew and fully intended to modify state marital property law.

Second, in creating QDROs, Congress opened the exclusive route for claiming ERISA plan benefits under state marital property law. As this Court stated in *Shaw*, "In deciding whether a federal law preempts a state statute, our task is to ascertain Congress' intent in enacting the federal statute at issue."[28] The statute here states expressly that domestic relations orders against ERISA plans, including orders based on community property law, are preempted unless they are QDROs.[29] Moreover, the surrounding statutory tax and ERISA scheme does not appear even to contemplate claimants under domestic relations orders other than QDROs.

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[26] I.R.C. § 414(p)(10).

[27] See discussion in Part III.

[28] 463 U.S. at 95.

[29] ERISA §§ 206(d), 514(b)(7), 29 U.S.C. §§ 1056(d), 1144(b)(7).

III. *BOGGS* WOULD PRODUCE SIGNIFICANT CONFLICTS BETWEEN STATE LAWS AND ERISA.

A. *Boggs* Would Allow a Wide Variety of State Law Intrusions on Pension Plans.

The reach of the *Boggs* decision is broader than its facts suggest:

First, nothing in the Fifth Circuit's reasoning would restrict its holding to community property. The decision reaches marital property rights of any sort.

Second, the decision is not confined to the reach of marital property rights today. If marital property rights to ERISA pensions outside of QDROs are not preempted, then state courts and legislatures are free to make such rights ever more flexible and marital property ever more tradeable and pension plans will be forced to deal with each such change.

Third, the decision is not confined to transfers of marital property rights in pensions in instances of death. Whenever such property is transferred, the issues we confront here would arise.

Fourth, it is not confined to court orders. Whenever marital property can be conveyed, there will be a change in ownership of the pension rights.[30]

Fifth, it is not confined to family members. If a spouse conveys his or her interest to charity or even to his or her creditors, the assignee would acquire an enforceable interest under an ERISA-covered plan.

Sixth, for the reasons discussed in Part I of this brief, we believe state courts will inevitably extend *Boggs* to direct levies on pension plans themselves.

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[30] As to the ability of spouses to convey their community property interests while alive and still married, see, *e.g.*, Ian F. G. Baxter, *Marital Property* § 18:1 *et seq.*, 20:1 *et seq.* (1973).

B. These State Law Intrusions Would Conflict With ERISA.

Boggs will permit claimants to collect against ERISA plans by enforcing orders that are not QDROs. This produces a number of conflicts with the ERISA and tax rules which govern these plans:

1. *Boggs* strikes at the heart of ERISA as Congress chose to modify it in REA: the protection of spouses in their expectations of retirement income, even against the disruption of divorce or death of the breadwinning spouse.

REA and its legislative history both show that Congress believed it was protecting a special kind of property interest; namely, the spouse's expectations in retirement income. Congress did not seek to create a more general category of spousal property interests.

A spouse's survivor interests in an ERISA plan benefit are not unfettered. Payment of the survivor benefit is not permitted to begin before the earliest date that the participant could have begun collecting the benefit as a retirement pension.[31] Payments under a QDRO are subject to a similar restriction.[32] That is, even for plan benefits paid out under the spouse's separate right, Congress chose that the benefits not lose their essential character as retirement income.

As we have already noted, REA's survivor benefit provisions created in the spouses of pension participants a property interest that divested other rights the participant might have had in the benefit—for example, the right to

[31] I.R.C. § 417(e)(2)(B), ERISA § 205(e)(1)(B), 29 U.S.C. § 1055(e)(1)(B) (survivor benefits cannot begin before participant would have reached earliest retirement age under the plan).

[32] I.R.C. § 414(p)(4), ERISA § 206(d)(3)(E), 29 U.S.C. § 1056(d)(3)(E) (QDROs cannot be distributed before participant reaches earliest retirement age under the plan).

provide survivor benefits to his or her own children. Legislative history shows that Congress believed it was the spouse's expectations of retirement income that served to trump these other rights against a pension.[33]

2. No one would ever ask a court for a QDRO if *Boggs* is upheld. QDROs contain numerous protections, designed to protect not only the claimant seeking to enforce the order, but all other potential claimants to the assets (we have outlined these above). Marital property laws do not contain those protections. Upholding *Boggs* would essentially repeal the QDRO statute.

3. The claimants under marital property orders or conveyances will not be "participants" or "beneficiaries" within the meaning of ERISA.

An ERISA "participant" is defined as an employee (or former employee) of the employer.[34] An ERISA "beneficiary" includes only two categories of individuals: (1) "a person designated by a participant, or by the terms of an employee benefit plan,"[35] and (2) a payee under a QDRO.[36] But the claimants under non-QDRO orders or conveyances are not participants or beneficiaries under any of these rules.[37]

This produces a serious anomaly. For instance, ERISA plan fiduciaries are required to administer plans for the exclusive benefit of participants and beneficiaries.[38] Fiduciaries have no obligation to look after the interests of non-QDRO claimants. Moreover, they would breach their

[33] S. Rep. No. 575, 98th Cong., 2d Sess. 12 (Aug. 5, 1984).

[34] ERISA § 3(7), 29 U.S.C. § 1002(7).

[35] ERISA § 3(8), 29 U.S.C. § 1002(8).

[36] ERISA § 206(d)(3)(J), 29 U.S.C. § 1056(d)(3)(J).

[37] The point was recognized (with respect to ERISA beneficiary status) in *Baker, supra.*

[38] ERISA § 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A).

fiduciary duties to the ERISA participants and beneficiaries if they devoted any plan resources to protecting those other interests. To require them to act as fiduciaries with respect to non-QDRO claimants would be to read the exclusive benefit requirement out of the statute.

As we discussed in Part I, the state courts are unlikely to conclude that there can be no rights without protections. Instead, if there is no federal protection for non-QDRO claimants, the state courts may move to fill the vacuum by insisting on state protection. They may insist, for instance, that participants be prevented from withdrawing money ultimately due other claimants. They may insist that a participant with investment authority over his or her account not be permitted to make investments that would jeopardize the share due other claimants. If the plan fiduciaries have investment authority, the courts may forbid the fiduciaries themselves from making such jeopardizing investments or hold them liable for damages if they do. These outcomes are not speculative, but, as we discussed in Part I, are based on results of pre-REA case law governing marital rights against pension plans.

These actions would drive a wedge of state authority into the heart of plans protected by ERISA, which was supposed to establish the regulation of employee benefit plans "as exclusively a federal concern." [39] Once allowed in, as state laws evolve, their intrusions are bound to intensify.

4. ERISA pension plans could lose their favorable tax treatment if non-QDROs could be enforced against them. Most ERISA pension plans (and the plans at issue in *Boggs*) are tax qualified plans. This means that they (and their participants) receive favorable tax treatment in return for complying with a set of complex tax rules.[40]

[39] *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 (1981).

[40] ERISA pension plans that are "qualified" under I.R.C. § 401 enjoy three tax benefits: (1) income on the trust is exempt from taxation, I.R.C. § 501(a); (2) the employer gets a current deduction for contributions to the trust, I.R.C. § 404(a); and (3) taxation on participants' vested rights in their pension benefit is deferred until the income is distributed, I.R.C. § 402(a).

Among other things, these rules contain strict requirements governing the earliest time a distribution can be made from a plan. Some of these requirements were waived by REA for distributions made pursuant to QDROs.[41] They were not waived for other distributions. Thus, if non-QDRO marital property orders are not preempted, a court may well order distribution to a non-QDRO claimant at a time when the tax rules do not permit distributions. Any distributions made under these circumstances will cause the plan—and its participants—to lose eligibility for favorable tax treatment under the Internal Revenue Code.

In this instance, we will find ourselves in the position of managing pension plans with diametrically opposed orders from different parts of the government,[42] each threatening the plans with severe penalties for noncompliance.

5. Non-QDRO orders will threaten the tax qualified status of plans in a second way. Another of the Internal Revenue Code's many requirements for favorable tax treatment is that the pension plan be maintained for the exclusive benefit of employees and their "beneficiaries." [43] (We have already discussed a similar rule in ERISA.) The term "beneficiaries" is defined to mean, "the estate of the employee, dependents of the employee, persons who are the natural objects of the employee's bounty, and any person designated by the employee to share in the benefit of the plan after the death of the employee." [44]

[41] I.R.C. § 414(p)(10).

[42] *I.e.*, a state court and the IRS.

[43] I.R.C. § 401(a)(2).

[44] Treas. Reg. § 1.401-1(b)(4).

Non-QDRO claimants may be none of these. Thus, allowing them rights will threaten tax-qualified plans with the enormous penalty of disqualification.[45]

6. Permitting non-QDROs is inconsistent with sound tax policy. We have already observed that, under *Boggs*, if a spouse conveys his or her interest to charity or even his or her creditors, the assignee would acquire an enforceable interest under an ERISA-covered plan. *Boggs* thus permits assignees with no conceivable relationship to the pension plan to enjoy the fruits of the tax-favored status that Congress conferred for the narrow and express purpose of promoting pension retirement security.

7. *Boggs* will also confound the personal income tax treatment of pension distributions. Generally, a married taxpayer in a community property state is taxable on only one-half of his or her income, while the taxpayer's spouse is taxable on the other half.[46] Prior to REA, this same principle applied to distributions from qualified plans, so that husbands and wives in community property states were taxed at the time of distribution only on their respective community property interest.[47]

REA made a fundamental change in the tax law regarding taxation of distributions from qualified plans in community property states. After REA, plan participants bear the full brunt of income taxation for plan distributions, except where there is a QDRO. If a former spouse is the alternate payee under a QDRO, then the alternate payee is taxed on the amount actually received by him or her.[48]

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[45] Rev. Rul. 73-238, 1973-1 C.B. 193; Rev. Rul. 69-493, 1969-2 C.B. 88.

[46] *U.S. v. Mitchell*, 403 U.S. 190 (1971).

[47] *Powell v. Commissioner*, 101 T.C. 489 (1993).

[48] I.R.C. §§ 72(m)(10), 72(t)(2)(C), 402(e)(1), 4980A(c)(2)(B) and (f)(4)(A).

Marital property orders that do not fall within the QDRO rules would not be addressed by these special tax-shifting rules, an issue which the Tax Court has squarely addressed in *Karem v. Commissioner*.[49] *Karem* involved the taxation of a lump sum pension distribution in a community property state. The Court noted that REA's changes to the tax rules shifted the tax on the entire amount back to the participant, except in cases where the spouse received payment under a QDRO. But since court order directing payment to the spouse in *Karem* on community property grounds was not a valid QDRO, the Court held that there was no tax shifting. As a result, the participant was liable for tax on the entire amount even though half went to his wife. 100 T.C. at 531.[50]

In short, Congress' careful scheme to split the taxes between a participant and an alternate payee receiving QDRO benefits would be stymied if non-QDROs orders were permitted. Benefits might be split, but the participant would be stuck with the whole tax bill.

IV. STATE LAW CLAIMS WOULD COMPLICATE AND BURDEN PLAN ADMINISTRATION.

Permitting non-QDRO claimants would also impose an immense administrative burden.

A. Payments of Pensions Would Be Delayed.

Allowing marital property orders or conveyances to reach pensions outside of the QDRO context will further undermine the pension system by causing plan fiduciaries to delay benefit payments until the possibility of rival claims has been settled.

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[49] 100 T.C. 521 (1993).

[50] Although the holding of *Karem* applies only to the taxation of lump sum distributions from qualified plans, the Tax Court notes they would have reached the same answer for non-lump sums as a result of the REA QDRO provisions.

ERISA section 404(a)(1)(D)[51] requires plan fiduciaries to follow the terms of the plan documents. As in the *Boggs* case itself, the typical situation will be one where the plan will direct payment to one individual while marital property rights may direct the payment of plan benefits to another.

ERISA section 404(a)(1)(B)[52] requires plan fiduciaries to act prudently at all times. If marital property claims are confined to the QDRO context, in the typical case the fiduciaries can make payment in accordance with the plan terms until a QDRO comes along. In most cases, a fiduciary need not fear having to pay more than once, because the QDRO rules, as noted above, prevent QDROs from requiring payments of benefits to one alternate payee when a prior order requires those benefits to be paid to another, and prevents a QDRO from directing a plan to pay increased benefits.

No such safeguards would exist if marital property claims outside of the QDRO context could be enforced. A prudent fiduciary would realize there may be multiple claimants to benefits on multiple occasions: a participant's divorce, the participant's death, the death of a former spouse, or even a conveyance by a spouse or former spouse of his or her community property interest in the participant's pension. In order to avoid the possibility of having to pay a pension more than once, a prudent fiduciary would want to hold up payments until either rival claims are settled or there is a determination that there are no rival claims.

B. Elaborate Systems Would Be Necessary to Track Possible Claimants.

We believe that the prospect of holding up pensions would be untenable for most employers. They know too well that their former employees and spouses need the

[51] 29 U.S.C. § 1104(a)(1)(D).

[52] 29 U.S.C. § 1104(a)(1)(B).

money to live on. One option available is to pay without waiting for rival claims to be settled and so take the risk of having to pay more than once.

Another option is to set up an administrative superstructure to try to track the possibility of marital property claims to eliminate the need to either hold up pensions or pay more than once. Such an attempt would be extremely burdensome and would not likely be successful.

First, it would require expertise in the marital property law of every state and the 50-state overlay of choice of law jurisprudence.[53] Second, a plan would have to track the geographical course of each participant's marriage as he or she moves from state to state over the course of a career. Plans would need copies of participants' wills, their spouses' wills and their former spouses' wills. They would have to track probate proceedings for potential claimants. They would have to track conveyances of marital property. They would have to know the whereabouts of the beneficiaries of all those wills and the assignees of those conveyances, whether they were alive or dead, and what their own wills provided. Prudent fiduciaries would want to set up a notification system to all these far-flung claimants and potential claimants to try to get claims raised and settled in relatively short order.

The Pension Benefit Guaranty Corporation[54] is so concerned with the problem of missing participants that it has issued regulations on the subject.[55] The thought that plans would be able to keep track of this much wider net of potential claimants, a group of people who will often have

[53] And, in today's world, every country.

[54] A federal government insurance corporation which guarantees qualified defined benefit pensions. It was created by Title IV of ERISA in 1974. *See Nachman Corp. v. Pension Ben. Guaranty Corp.*, 446 U.S. 359, *reh'g denied*, 448 U.S. 908 (1980).

[55] PBGC Reg. §§ 4050.1 *et seq.*

only remote and contingent interests in staying in touch with the plans, is rather unrealistic.

In any event, these measures would impose an extraordinary and expensive burden. Nor can one simply answer that "This is just a cost of doing business," passed on to the employer and from the employer to its customers. As this Court recognized in *Shaw*, additional costs also lead to reduced benefits.[56]

Nor is the reduction of benefits always indirect. Pension plans come in two different forms. One is "defined benefit," which means that an employee is promised a specified benefit and the burden is then on the employer to fund those benefits. ERISA § 3(35).[57]

Our association is concerned with the other type of plan, the "defined contribution" or "individual account plan." There, the employer makes contributions into separate accounts for each participant without promising that the plan will be able to pay any particular benefit. ERISA § 3(34).[58] The employee gets his or her benefits based on the contributions and the earnings on those contributions, but minus the plan's administrative costs.

The Department of Labor has taken the position in the QDRO context that a plan may not charge a participant's individual account for the often substantial administrative costs of dealing with the participant's court proceedings leading up to a QDRO and then with respect to implementing the QDRO itself.[59] Accordingly, the costs of dealing with a participant's marital property issues even in the relatively circumscribed QDRO context are borne not by that participant but may be borne by every participant

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[56] 463 U.S. at 105, n.25.

[57] 29 U.S.C. § 1002(35).

[58] 29 U.S.C. § 1002(34).

[59] Adv. Op. Dep't Labor 94-32A (1994).

in the plan, reducing the benefits eventually available to pay pension benefits. This benefit reduction would be multiplied many times over if marital property rights outside of QDROs were allowed to reach pensions.

As a final note on this aspect, it should be mentioned that interpleader does not provide a practical solution.

For one thing, interpleader does not solve the most pressing problem: delays in paying pension benefits. Interpleader proceedings can drag on for years.

Second, interpleader proceedings need monitoring even by the stakeholder who claims no interest in the disputed amount. Monitoring means time and expense. The parties and family property courts are often unfamiliar with the intricacies of pension law and frequently seek the pension administrator's help in understanding the benefits available and the conditions surrounding them. In trying to fashion relief, they raise issues which require the pension administrator to seek legal advice. Parties may want the plan to pay interest, effectively trying to redesign a plan's terms.

In other cases, the parties and court may consult the pension administrator hardly at all. But at the end, they will devise an inappropriate court order, such as asking a plan to turn over a portion of participant's account plus earnings in a case where a defined benefit plan is involved so that there are no accounts or "earnings." The administrator must then go back to the court to explain that the order contemplates the wrong kind of plan.

These are the realities of interpleader from our plans' point of view. They require plans to hire lawyers to monitor and review the proceedings and to respond to what the plans may view as inappropriate orders. This is no small expense.

C. Confiicting State Laws Would Force Plan Administrators to Decide Competing Claims.

Plans will also be exposed to conflicting state regulations, one of the things ERISA preemption was expressly designed to prevent.[60] State laws may vary (and could vary further in the future) as to when marital property rights attach to pensions. For one, it might be at the time of benefit accrual, for another, at the time of vesting, for a third, after some contingency, such as a disability triggering a disability pension. If a participant has spouses from two different jurisdictions, they might have equal rights to the same part of a pension as a result. The QDRO statute would prevent a plan from having to pay more than once in such a case, but if non-QDRO claims are permitted, there would be no such protection. Plans could easily face conflicting directives from different courts as to how to parcel out pension benefits.

D. Liquidity Levels Would Be More Difficult to Manage.

Plans need liquidity to pay benefits, but liquid assets generally earn lower returns so that keeping too large a portion of the pension portfolio liquid results in lower investment returns. That translates into higher benefit costs or lower benefits.

Confining marital property orders to QDROs keeps liquidity concerns within bounds, because QDROs cannot force a plan to pay benefits in a form not contemplated by the plan nor earlier than the participant's earliest retirement date. Marital property orders outside of the QDRO confines would not be subject to any such restrictions. This would force plans to maintain liquidity at levels higher than now necessary.

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[60] *E.g., New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 115 S.Ct. 1671 (1995).

E. Plans Would Require Amendments to Handle New State Law Claims.

Plan fiduciaries are required to follow a plan's terms.[61] In the QDRO context, for instance, a plan cannot informally put a hold on a participant's benefits until resolution of divorce proceedings.[62] If *Boggs* is upheld, every plan in the country will have to be amended, and procedures implemented, to provide how to deal with non-QDRO claims.

F. Exposing Plans to State Law Claims Would Increase Litigation Costs.

ERISA permits a prevailing party to recover attorney's fees.[63] On top of all the other burdens of dealing with non-QDRO claimants, plans will have to fear paying not just benefits, and a court's determination of appropriate interest, but potentially attorney fees as well.

Attorney fees can often greatly exceed the amount of benefits involved because ERISA benefit claims often resemble class actions from the plan's point of view. A particular claimant might be demanding only $10,000, but the claim might involve an issue which arises for many other potential claimants, perhaps involving amounts far in excess of $10,000. If the plan views the claim as putting, say, $10 million at stake for the plan as a whole, it might be rational for it to put $100,000 in defending a claim it believes is unfounded. If it loses, it might have to pay opposing counsel fees far in excess of $10,000.

G. Claims Under Conflicting Laws Would Invite Litigation.

The private pension system has grown so well under ERISA, that for many Americans, their pension is now

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[61] ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D).

[62] *Schoonmaker v. Empolyee Sav. Plan of Amoco Corp.*, 987 F.2d 410 (7th Cir. 1993).

[63] ERISA § 502(g), 29 U.S.C. § 1132(g).

their family's biggest asset, often more valuable than their house.[64] That, combined with the attractive possibility of winning attorney fees from a plan, will attract all sorts of imaginative litigation.

We believe that Congress tried to curtail such activity by preempting marital property claims that did not comply with the QDRO procedures and restrictions, and we urge the Court to so hold.

CONCLUSION

ERISA's provisions for the protection of spouses in the event of divorce or death of a pension plan participant represent a carefully designed balance between family property interests and the uniform federal scheme created by ERISA. The Court should hold that marital property rights to ERISA pensions under state law are preempted unless they are derived from QDROs. For all the foregoing reasons, this Court is respectfully urged to reverse the court of appeals decision.

Respectfully submitted,

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[64] Mr. Boggs received a lump sum of about $150,000 plus a monthly annuity of about $1,777.67. The discounted present value of the pension annuity would depend on life expectancy and interest rate assumptions; assuming a 20-year payout and 6% interest, the annuity and lump sum combined would yield roughly $400,000.